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No. 86-355

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

KLAUS J. PORZIG AND ELLEN PORZIG,
Petitioners,

VS.

M. NOLDEN,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MILTON MAXWELL NEWMARK
P.O. Box 2250
Dollar Ranch Station
Walnut Creek, CA 94595
(415) 930-0404
Counsel for Respondent.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

9 pp

QUESTION PRESENTED

Should a writ of certiorari issue to permit this Court to review the affirmation by the Circuit Court of Appeals for the Ninth Circuit of judgment of the Bankruptcy Court authorizing the Bankruptcy Trustee to sell property of possibly solvent estate.

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Respondent M. Nolden, Bankruptcy Trustee of Edward R. FitzSimmons, opposes the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 3, 1986.

STATEMENT OF THE CASE

Edward R. FitzSimmons, who was then admitted to practice law in the State of California, filed a voluntary petition under Chapter 11 of the Bankruptcy Code on July 21, 1980. On October 23, 1980 Edward M. Walsh was appointed trustee of the debtor estate, and on March 22, 1983 the case was converted to a proceeding under Chapter 7 of the Bankruptcy Code, and respondent M. Nolden was appointed Chapter 7 Bankruptcy Trustee. On June 1, 1984 respondent was substituted as plaintiff in this matter.

Respondent quotes from the Memorandum of the United States Circuit Court of Appeals for the Ninth Circuit which appears on page 2-a of Petitioners' Appendix:

> "... Edward Fitzsimmons ... filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et. seq.* (1982), on July 21, 1980. Thirteen months earlier, he had purchased 1.7 acres of unimproved property on the Mendocino County coast. The deed was recorded in his name on June 19, 1979. The next day he and the Porzigs, his daughter and son-in-law, signed a letter purporting to set up an equitable interest in the property in favor of the Porzigs. They agreed that Fitzsimmons would make the initial payments on a deed of trust of $25,000, and hold record title to the property for the Porzigs; they would take over the payments in 1980, and reimburse Fitzsimmons for the initial payments. Fitzsimmons promised to convey title to the Porzigs after the payments on the note were completed, but until then they were 'not authorized to encumber this property in any way.' The letter was not recorded.
>
> "The Porzigs paid their first installment on the note in December 1980. In June 1982 they were assigned the deed of trust. Title remains in the debtor's name.
>
> "On October 22, 1982 the trustee filed a complaint in bankruptcy court to avoid, pursuant to 11 U.S.C. § 544(a)(3) (1982), appellants' claim to a beneficial interest in the property based on the June 1979 letter.
>
> "The bankruptcy judge granted summary judgment for the trustee. He rejected the Porzigs' argument that summary judgment was improper because the debtor's solvency was at issue, requiring the court to resolve that question before permitting the trustee to collect and liquidate the property of the estate, under 11 U.S.C. § 704(1) (1982). In granting the trustee's motion, the court states, '[t]he allegation that the estate is greater than the legitimate claims of creditors is irrelevant.' "

The Court of Appeals affirmed the summary judgment issued by the Bankruptcy Court in respondent's favor holding inter alia:

> "The Porzigs' equitable interest in the property, 'devised' by the 1979 'trust agreement,' is invalid against subsequent bona fide purchaser's because it is unrecorded. The debtor has never relinquished title to that property. The trustee, therefore, may properly invoke 11 U.S.C. § 544(a)(3) (1982) to avoid the Porzigs' purported equitable interest."
>
> (Page 9-a of Petitioners' Appendix)

REASONS FOR DENYING THE WRIT OF CERTIORARI

The issuance of a writ of certiorari is inappropriate under Supreme Court Rule 17.

The decision of the Federal Court of Appeals appealed from is neither in substantial conflict with the decision of another Federal Court of Appeals nor is it a decision of a Federal Court of Appeals on an important question of federal law which has not been but should be settled by this Court.

Contrary to the assertion of the Petitioners, the ruling appealed from does not conflict squarely with the holding of the Seventh Circuit *In re Joslyn,* 198 F.2d 673.

As stated by the Court of Appeals for the Ninth Circuit in its Memorandum which appears on page 7-a of Petitioners' Appendix:

> "Nor does the sole case which appellants cite support their position. *In re Joslyn,* 198 F.2d 763 (7th Cir. 1952), *cert. denied,* 345 U.S. 905 (1953), held that where the debtor's father paid the full amount of a debt still outstanding after the original bankruptcy proceeding was closed, the trustee was not entitled once again to have all the debtor's assets turned over to him for liquidation and distribution, even though the debtor failed to schedule one asset in the original proceeding. *See in re Joslyn,* 102 F.Supp. 521, 524 (N.D. Ill. 1951). The unscheduled asset, the debtor's interest in trust income, was probably not subject to execution under state law anyway.

> "Here the bankruptcy proceeding is still pending, the trustee already has authority over all property of the estate and the debtor has many outstanding debts. Further, the Porzigs' claim to an equitable interest in the property is inferior to that which the trustee may assert."

Petitioners seek to imply that the debtor estate of Edward R. FitzSimmons is a solvent one. Respondent trustee has never conceded the solvency of such estate nor has there been a judicial determination to that effect. Respondent asserts that it is not a condition precedent for the authorization of a sale of debtor's property to litigate the solvency of the estate. Any other determination would place an impractical brake on bankruptcy administration. The public confidence in a bankruptcy system is maintained by the prompt and efficient operation thereof.

Petitioners assert that the inequity of the Ninth Circuit's holding provides grounds for review by this Court.*

In fact, the Ninth Circuit affirmed a judgment of the Bankruptcy Court which invalidated a trust assertedly arising from an unrecorded letter.

Petitioners also assert that the property at issue in this proceeding is property which has been held by the petitioners for many years. As appears from Order of District Court/Summary of Facts, which appears on page 12-a of Petitioners' Appendix, a voluntary petition was filed on July 21, 1980 and legal title to the real property in question was acquired by deed recorded June 19, 1979.

Respondent asserts that it is the duty of the bankruptcy trustee to "collect and reduce to money the property of the estate . . ." (11 U.S.C. § 704(1)) and that the solvency of the debtor is irrelevant with respect to the trustee's duties. This assertion was accepted by the Bankruptcy Court, the District Court and the Court of Appeals. In such circumstances, the granting of summary judgment was proper and 56(c) F.R.C.P. was inapposite because there was no genuine issue as to any material fact.

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* Petition for Writ of Certiorari, page 14.

CONCLUSION

Respondent's position is that the decision of the United States Court of Appeals for the Ninth Circuit concerning which a writ of certiorari is sought was fair, reasonable, substantiated by law and should not be the subject of a writ of certiorari by this Court.

Dated: September 26, 1986

Respectfully submitted,

MILTON MAXWELL NEWMARK
P.O. Box 2250
Dollar Ranch Station
Walnut Creek, CA 94595
(415) 930-0404
Counsel for Respondent